

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INTERNATIONAL BUSINESS MACHINES: Civil Action No. 1:10-cv-00128-PKC
CORPORATION, :
:
Plaintiff, : **DECLARATION**
:
-against- : ECF CASE
:
BGC PARTNERS, INC., BGC BROKERS :
US, L.P., BGC FINANCIAL L.P., and BGC :
USA, L.P., :
:
Defendants. :
:
:
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The undersigned, R.C. Rolfe, hereby declares:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.
2. I am the Vice President of Software Group World Wide Enterprise Sales and Compliance, at International Business Machines Corporation (“IBM”) at Route 100, Somers, NY. I have held this position since 2004. Prior to 2004, I worked in other roles for IBM since 1982.
3. In 2001, IBM purchased the Informix software from Informix Corporation. Since 2001, IBM has developed new versions of the Informix software and has developed and acquired additional software products that are also part of the Informix family of software products.
4. After acquiring the Informix software, IBM began to migrate former Informix licensees, including the defendants’ predecessor Euro Brokers (collectively, with the defendants, “BGC”), to the IBM Passport Advantage program.
5. By migrating to the Passport Advantage program, former Informix licensees entered into new licenses with IBM, including the International Program License Agreement (“IPLA”), that governed use of the Informix family of products by licensees. *See Exhibit A (IPLA).*

6. BGC agreed to a new license with IBM, including the terms of the IPLA, no later than 2003, and was granted a license to possess and use a limited number of copies of IBM Informix software products pursuant to the terms of the Passport Advantage program and the IPLA. *See Exhibit B (Purchase Order); Exhibits C-I (Proofs of Entitlement).*
7. BGC further agreed to be bound by IBM's licenses and license terms when it downloaded products in IBM's Informix family of software products. For example, BGC agreed to the following terms before downloading Informix software products via IBM's Passport Advantage portal:

Software download & media access

Terms for Passport Advantage

Please read carefully all terms and print and store them for your records.

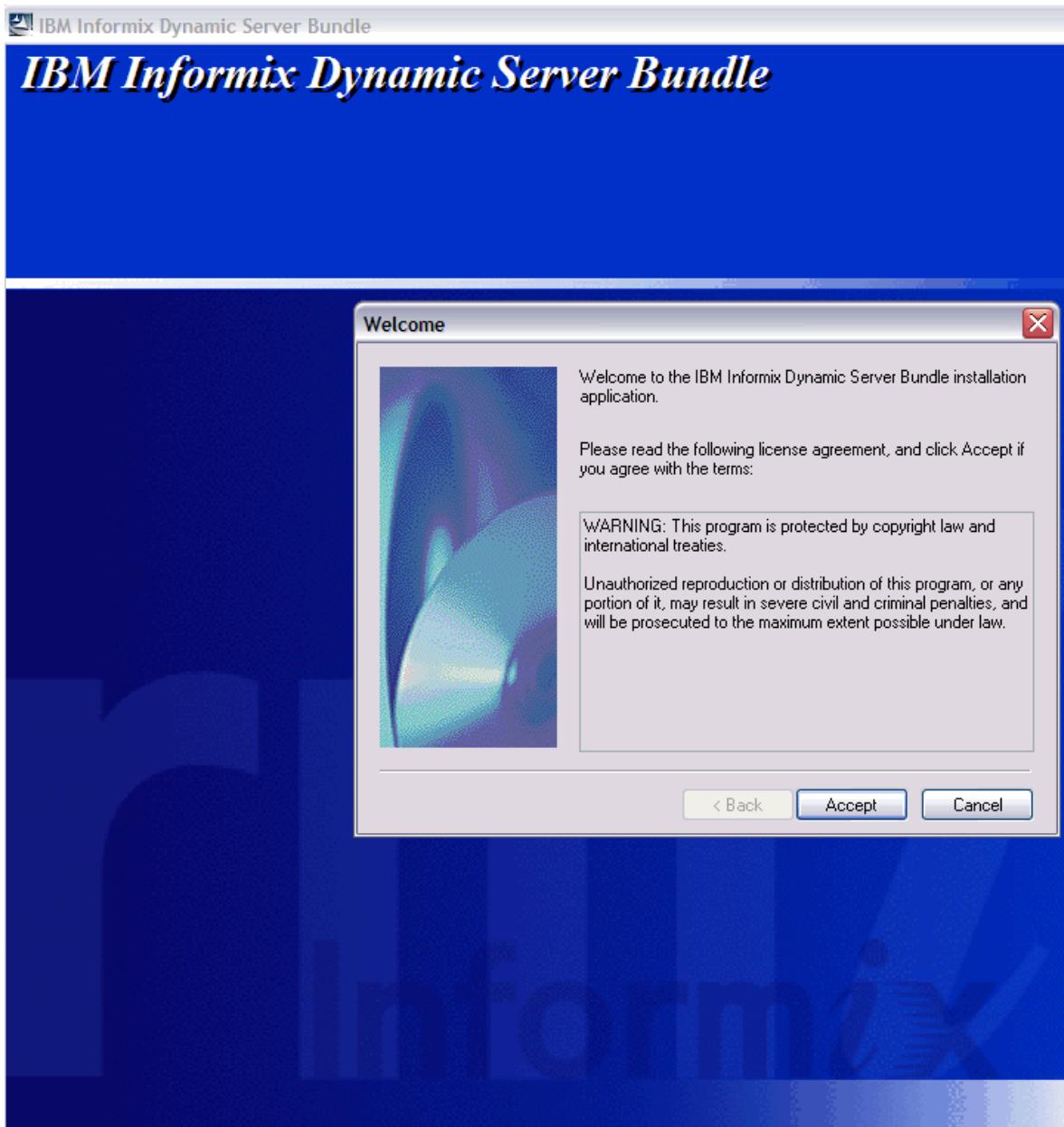
By clicking on the "I agree" button below, you agree that the Passport Advantage Eligible Products that you are either ordering or downloading or both in this transaction are subject to the terms of (1) your IBM International Passport Advantage Agreement, any attachments to it, and (2) the IBM International Program License Agreement, including any additional terms contained in (3) the software's License Information documents. Passport Advantage Eligible Products include, but are not limited to, licenses, software upgrades in the form of new versions, releases, or updates provided as part of your Site's active Software Subscription and Support coverage, and Renewals.

You may view and obtain copies of the above referenced agreements by clicking the links provided below and following the prompts as indicated.

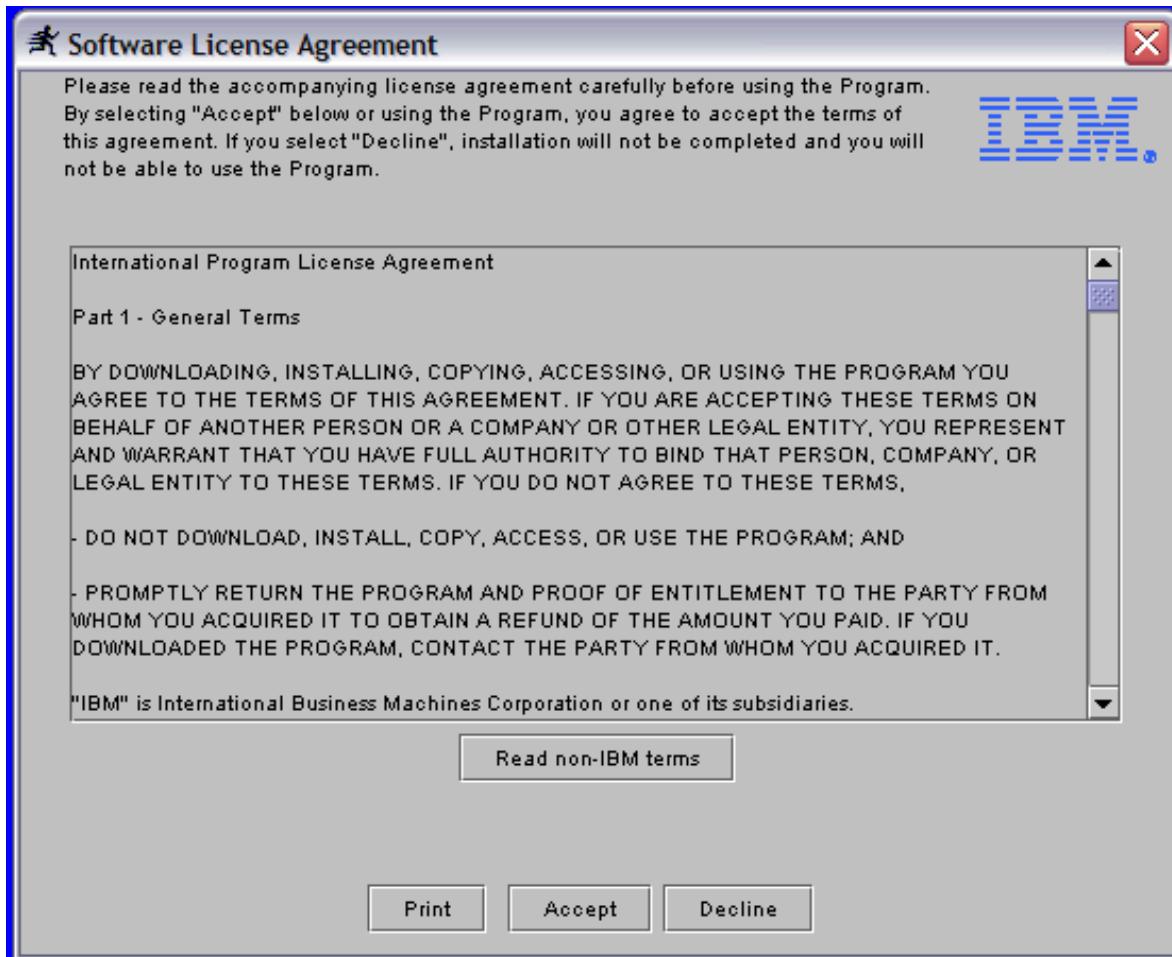
1. [IBM International Passport Advantage Agreement](#) (PDF, 95KB)
2. [IBM International Program License Agreement](#)
3. [License Information documents](#)

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8. BGC further agreed to be bound by IBM's licenses and license terms when it installed products in IBM's Informix family of software products. For example, BGC agreed to IBM's license terms before installing Informix Dynamic Server version 9.4 and version 10.0. The following is one screen that was displayed to BGC when Informix Dynamic Server version 9.4 was installed:



The following is one screen that was displayed when Informix Dynamic Server v. 10.0 was installed:



For both versions 9.4 and 10.0, the terms of IBM's IPLA were displayed during installation and Informix Dynamic Server would only install on BGC's computers after "Accept" was selected.

9. In 2008, as part of its regular efforts to confirm that licensees had not over-deployed licensed software, IBM hired KPMG to audit BGC. Based on KPMG's final report, IBM determined that BGC had over-deployed at least two IBM Informix software products. *See Exhibit J (KPMG Audit Report).*
10. After IBM tried unsuccessfully to bring BGC into compliance with the terms of its licenses, IBM terminated the IPLA as of December 31, 2008. *See Exhibit K (December 29, 2008 Notice of License Termination).*
11. Attached as Exhibit L is a list of IBM Informix software products that were downloaded by BGC through IBM's Passport Advantage portal as of November 2009. *See Exhibit L (IBM Download Report).*

12. Based on the KPMG Audit Report and the IBM Download Report, at least the following IBM Informix software products are currently in the possession, custody, or control of BGC (collectively, the “Informix Software”):

IBM Informix Software Products	Documentation
Informix Dynamic Server v. 7.31	IBM Download Report 10/21/05
Informix Dynamic Server v. 9.21	KPMG Audit Report
Informix Dynamic Server v. 9.3	KPMG Audit Report
Informix Dynamic Server v. 9.4	KPMG Audit Report; IBM Download Report 8/15/05, 8/16/05, 9/9/05, 9/13/05, 3/31/06, 11/17/06, 1/8/08, 1/9/08, 5/21/08, 9/2/08, 9/3/08, 9/26/08, 11/24/08, 2/4/09
Informix Dynamic Server v. 10.0	KPMG Audit Report; IBM Download Report 8/8/06, 11/17/06, 4/20/07, 5/23/07, 6/6/07
Informix Dynamic Server v. 11.10	IBM Download Report 7/12/07, 7/17/07
Informix Server Administrator v.1.60	IBM Download Report 4/20/07
Informix Client SDK v. 2.81	IBM Download Report 4/23/07
Informix Client SDK v. 2.90	IBM Download Report 5/23/07, 5/21/08, 1/28/09, 2/4/09, 3/13/09
Informix Client SDK v. 3.00	IBM Download Report 4/20/07, 8/22/07
Informix 4GL Compiler Development v. 7.32	IBM Download Report 9/9/05, 2/4/09, 3/13/09
Informix 4GL Compiler Development v. 7.50	IBM Download Report 1/28/09
Informix 4GL Rapid Development Systems Development v. 7.32	IBM Download Report 9/9/05, 2/4/09, 3/13/09
Informix 4GL Rapid Development Systems Development v. 7.50	IBM Download Report 1/28/09
Informix 4GL Interactive Debugger v. 7.32	IBM Download Report 9/9/05, 2/4/09, 3/13/09

IBM Informix Software Products	Documentation
Informix 4GL Interactive Debugger v. 7.50	IBM Download Report 1/28/09
Informix 4GL Development v. 7.32	IBM Download Report 8/4/05
Informix SQL Development v. 7.32	IBM Download Report 9/9/05, 2/1/08, 2/4/09, 3/13/09
Informix SQL Development v. 7.50	IBM Download Report 1/28/09
Server Studio JE by AGS v. 6.0	IBM Download Report 5/23/07

13. Since at least December 31, 2008, following IBM's termination of the IPLA, BGC has had no right to possess or use the Informix Software. BGC currently is wrongfully retaining the Informix Software.
14. IBM is entitled to possession of the Informix Software.¹
15. IBM demanded that BGC return the Informix Software to IBM, but BGC refused to do so.
16. IBM seeks the return of every copy of the Informix Software that is currently in the possession, custody, or control of BGC.
17. The aggregate value of the Informix Software is at least \$1,214,925 based on the number of copies downloaded by BGC and documented by KPMG during the KPMG audit. If BGC is using additional copies or sessions, the value may be greater.
18. IBM has commenced an action to recover the Informix Software and has filed a First Amended Complaint naming BGC Partners, Inc., BGC Brokers US, L.P., BGC Financial L.P., and BGC USA, L.P. as defendants. Counsel for BGC Partners, Inc. has appeared in the case and received the First Amended Complaint through the Court's ECF system. IBM served summonses and the First Amended Complaint on BGC Brokers US, L.P., BGC Financial L.P., and BGC USA, L.P. at the address of their registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. IBM expects that counsel for BGC Brokers US, L.P., BGC Financial L.P., and BGC USA, L.P. will appear in the action and provide an address where papers in this action may be served upon them, but also expects that they will be on notice of all activity in this action because they are subsidiaries of BGC Partners, Inc.
19. IBM seeks inclusion in the requested Order a provision requiring BGC to return all copies of the Informix Software in BGC's possession. In the alternative, IBM seeks an Order authorizing the sheriff to break open, enter and search for copies of the Informix

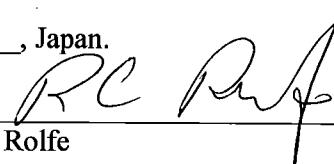
¹ One Informix Software product, the Server Studio JE by AGS, was developed by AGS Ltd. in close cooperation with IBM, is marketed by IBM, and was downloaded by BGC through IBM's Internet portal. Therefore, IBM has a superior right of possession.

Software at BGC's offices at 1 Seaport Plaza, 199 Water Street, 18th and 19th Floors, New York, NY 10038, including authorization for the sheriff to seize every computer, server, or archive device on which a copy of the Informix Software is stored. There is probable cause to believe that the Informix Software is at the location above because it is the address at which IBM historically has communicated with BGC, is a company address listed on BGC's Web site (<http://www.bgcpartners.com/contact-us/new-york/>), and is the principal place of business of BGC Financial, L.P.

20. IBM does not know of any valid defense that BGC may assert against IBM's claim that it is entitled to possession of the Informix Software.
21. IBM does not seek this Order of Seizure without notice to BGC.

I declare under penalty of perjury under the laws of the United States of America and the State of New York that the foregoing statements are true and correct to the best of my knowledge.

Executed on January 28 2010, in Tokyo, Japan.



R.C. Rolfe

CERTIFICATE OF SERVICE

The foregoing document was served on counsel for defendants BGC Partners, Inc., BGC Brokers US, L.P., BGC Financial L.P., and BGC USA, L.P. on January 29, 2010 by ECF.

/s/ Bronson J. Bigelow
Bronson J. Bigelow